

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Ranking Member, Senate Judiciary Committee
"Oversight Hearing: Aiding Terrorists - An Examination of the
Material Support Statute"
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Today's hearing marks the long-awaited continuation of a series of oversight hearings we began last year on the USA PATRIOT Act. In fact, it is the first oversight hearing of any kind that we have held all year. I welcome it, and I welcome our distinguished witnesses.

I thank the Chairman for scheduling this hearing at a time that works for all of our witnesses so that we can hear different points of view rather than the echo chamber most often favored by the Administration. The entire Committee, and indeed, the entire Senate, benefits when we can hear from the leading authorities on both sides of an issue, as we will do today.

We are still waiting for Attorney General Ashcroft to appear before this Committee. It has been well over a year since the Attorney General's last, brief appearance on March 4, 2003. He returned to work nearly two months ago, after being briefly hospitalized for a medical condition, and there is no apparent reason for his continued delay in scheduling a time to testify and to answer the many oversight questions that have been piling up since his last appearance. I noticed he appeared last month before the 9/11 Commission.

We are also working with the Chairman to schedule an oversight hearing with FBI Director Mueller. I understand that the Director was available to testify next Wednesday, but we are not holding the hearing on that day because Secretary Ridge was not available, and the Chairman wanted him to testify at the same hearing. That is, of course, the Chairman's right. But if the Director is available to us next week, we should take advantage of that opportunity. I know we all have questions for him, and I see no reason why we should have to wait for his answers until Secretary Ridge can be here. Instead of an FBI oversight hearing with Director Mueller, the Committee will apparently take the day off next Wednesday - there has been no notice of any full Committee hearing for that day.

If we will not hear from the FBI Director next week, there is other oversight that we can and should do. I have long urged the Chairman to hold a hearing on the Administration's claim that it can designate U.S. citizens as "enemy combatants" and hold them incommunicado without charges. It is appalling to me that the Hamdi and Padilla cases have worked themselves all the way up to the Supreme Court - and will likely be decided by that Court - before this Committee has ever weighed in on this issue.

I have also asked the Chairman to hold a hearing on the reported abuse of prisoners by Americans in Iraq. Given the wide-ranging jurisdiction of this Committee over civil liberties and prisons, the reported role of civilian contractors, our role in enactment of the Military Extraterritorial Jurisdiction Act, and the lack of other congressional oversight, we need to act. I sent the Chairman a letter on Monday, following the revelations over the weekend.

At this morning's hearing we will focus on two criminal statutes that have come under some fire in the federal courts. Sections 2339A and 2339B of title 18 prohibit the provision of "material support" to terrorists and to designated foreign terrorist organizations. Since the 9/11 attacks, these statutes have become the weapon of choice for domestic anti-terrorism prosecution efforts. But with the increased use of these statutes, some problems have come into focus.

What Constitutes "Material Support"

First, the key term in the statutes - "material support" - is defined by reference to a laundry list of broad terms, all of them undefined. These include, for example, "currency or other financial securities"; "weapons"; "explosives"; "false documentation or identification"; "transportation"; "lodging"; "facilities"; "communications equipment"; "personnel"; "training"; and "expert advice or assistance."

While few of these terms are models of clarity, most are clear enough. For example, we all know what "currency" and "explosives" are. But some of the terms included in the "material support" definition are considerably less clear.

Does a person provide "personnel" merely by providing her own services, as the Government has argued in several cases? Is using the conference call feature on one's telephone enough to satisfy the prohibition on providing "communications equipment," as the Government has also argued? Would teaching international law or some other innocuous subject to the members of a designated terrorist organization qualify as "training"?

And what does it mean to provide "expert advice or assistance"? We added that term in the USA PATRIOT Act, at the request of the Administration, but in the rush to pass anti-terrorism legislation after the 9/11 attacks, there was little discussion of what was meant by the term, and important clarifications did not occur.

Then there is the meaning of the concept of materiality, itself. When Congress criminalized "material support," it intended there to be significance to the support, not just incidental contact with what is suspected to be a suspicious group.

Multiple courts have found parts of the "material support" definition to be unconstitutionally vague. Vague statutes raise concerns because they can punish people for behavior they did not know was illegal, lead to arbitrary and discriminatory enforcement by government officers, and chill protected activity.

The chilling effect of our "material support" laws is not hypothetical, but real. In 2002, for example, officials of the University of California at San Diego directed two student groups to remove links from their Web sites to the Web sites of groups that the U.S. State Department had identified as "terrorist organizations." The American Association of University Professors (AAUP) and others petitioned the school to reverse course, arguing that its construction of the term "material support" was overbroad and would prevent any professor, student, or campus news organization from using links for scholarly and reportorial purposes. As AAUP wrote to the University, "Americans have a right to inform themselves about any group, no matter how abhorrent its positions. Acts in furtherance of terrorism are prohibited; speech about it is not."

In February -- nearly three months ago -- I wrote to the Attorney General to ask how the Department interprets some of the terms included in the "material support" definition. I have yet to receive a response from the Attorney General. I hope to get some answers from our witnesses today.

Specific Intent Requirement

A second problem that courts have identified in this area relates to the level of intent required for conviction. As we all know, intent - or mens rea -- is a crucial component of our criminal justice system.

The first material support statute, section 2339A, is straightforward on the issue of intent. It prohibits providing material support or resources, "knowing or intending that they are to be used in preparation for, or in carrying out, [a terrorist act]."

By contrast, section 2339B appears to criminalize the provision of material support to a designated terrorist organization, regardless of whether the defendant had a specific intent to further the organization's unlawful ends. In prosecuting cases under this statute, the Government has argued that a defendant may be convicted for providing support to an organization even if he did not know the organization had been designated as a "terrorist organization," and even if his sole intent was to further the organization's lawful humanitarian goals.

Courts have resisted this interpretation, and for good reason. Otherwise, as one court noted, a woman who buys cookies from a bake sale outside of her grocery store to help displaced Kurdish refugees find new homes could be held liable so long as the bake sale had a sign that said the sale was sponsored by the Kurdistan Workers' Party, or "PKK", without regard to her knowledge of the organization's designation or other activities.

Or to take another example, Pentagon advisor Richard Perle could perhaps be considered to have violated the material support law earlier this year, when he spoke at a charity event sponsored by at least three organizations with ties to a designated terrorist organization. Mr. Perle believed he was assisting the Iran earthquake victims when he delivered the paid speech.

Designation of Terrorist Organizations

A third concern about section 2339B, also being challenged in the courts, relates to the process for designating organizations as "terrorist organizations." In a criminal prosecution under section 2339B, may the defendant challenge the State Department's designation of the organization he is alleged to have supported? Courts have gone both ways on this question.

Conclusion

I have noted a few areas in which the material support laws need work. There may be others. I hope we can make some progress this morning.

One of the dangers with vague statutes that accord maximum discretion to prosecutors is that we prosecutors have to be cognizant of our power and make judgments. When prosecutors overreach, overuse a provision, or overcharge, it puts pressure on the courts to rein them in and on the construction of the statute itself. Sometimes Congress is called upon to revisit an area and clarify the law to do what is intended.

Former Assistant Attorney General Viet Dinh, who has been a staunch defender of the USA PATRIOT Act, has recognized the need to clarify the material support laws to avoid government overreaching. In January 2004, he said: "I think we can all agree that there are certain core activities that constitute material support for terrorists, which should be prohibited, and others which would not be prohibited. Congress needs to take a hard look and draw the lines very clearly to make sure that we do not throw out the baby with the bath water."

Today's hearing gives us an opportunity to discuss where those lines should be drawn.

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